United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7318

United States Court of Appeals

For the Second Circuit

In the Matter of the Petition for Arbitration

Between

FAIR WIND MARITIME CORPORATION, as Owners of the S. S. ISABENA",

Petitioner-Appellee,

and

TRANSWORLD MARITIME CORPORATION, as Charterer,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLEE

HEALY & BAILLIE
Attorneys for Appellee
Fair Wind Maritime Corporation
29 Broadway
New York, New York 10006
(212) 943-3980

JACK A. GREENBAUM,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES AND STATUTES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

In the Matter of the Petition for Arbitration between	Docket No.
FAIR WIND MARITIME CORPORATION, as Owners of the S.S. "ISABENA",	76-7318
Petitioner-Appellee,	
and	
TRANSWORLD MARITIME CORPORATION, as Charterers,	
Respondent-Appellant,	
Under a Charter Party dated June 14, 1972.	

BRIEF FOR APPELLEE

Statement of the Issues

1. Is the United States District Court empowered to adjudicate an allegation that arbitrators are incompetent or biased, after the arbitration hearings have commenced and before an Award has been rendered?

2. Has appellant waived any challenge to the present panel on the basis of an alleged incompetence or bias?

Statement of the Case

Appellee, owner of the S.S. "ISABENA", (hereinafter "shipowner"), seeks to arbitrate its claim against appellant-charterer (hereinafter "charterer") that the vessel capsized due to charterer's unsafe stowage of the cargo.

This is the second time this case is before the Court of Appeals. The first (Docket No. 74-1152) was on charterer's appeal from the District Court's rejection, after argument and re-argument, of charterer's contention that shipowner's claim was not arbitrable because it allegedly lacked merit. (Affidavit of Mr. Greenbaum, App. 4a-9a; Opinion of District Judge Pierce, dated November 27, 1973, App. 10a-16a). The Court of Appeals affirmed, from the bench, at the close of charterer's oral argument.

On December 17, 1973, the District Court appointed as an arbitrator on charterer's behalf Prof. Joseph C. Sweeney, Fordham Law School. (App. 17a-18a). At that time, it was known that Prof. Sweeney was a professor of law. However, charterer did not object to the District Court on its belated motion for re-argument, or at any other time concerning Prof. Sweeney's qualifications. The issue was not raised on the appeal which was taken thereafter. Charterer never requested or pursued the right to select its own appointee.

The panel was completed in due course and the first hearing was held on December 8, 1975. (Transcript of Hearing, App. 19a-53a). The arbitrators disclosed their business affiliations and any relations they may have had with the parties or the attorneys. Charterer's counsel also exercised his right to examine the panel further on these matters. (App. 21a-24a).

Charterer's counsel then expressly accepted the panel, but purportedly only for the purpose of deciding char-

terer's intended motion for "summary judgment". Shipowner's counsel pointed out that the panel's jurisdiction to decide the fact issues had been declared by the District Court, and further that the charterer must accept the panel as qualified, or express any objections in this respect, but that charterer could not accept the panel as qualified for some purposes, and not for others. However, charterer maintained its position. (App. 25a-31a).

The arbitrators rejected charterer's request to submit briefs in support of a motion to dismiss the arbitration, ruling instead that they would receive evidence. (App. 40a-45a). At that point, charterer's counsel refused to proceed with the arbitration and he walked out of the room. (App. 51a). As a result, the panel reversed itself and agreed to accept briefs. (App. 51a-52a). On February 27, 1976, the panel unanimously denied charterer's motion. (App. 54a).

On April 8, 1976, shipowner's counsel called the panel chair s office, and, in his absence abroad, wrote to the panel and charterer's counsel, urgently requesting a hearing to take the testimony of a Chinese seaman who would be available to testify for a short time. (App. 7a, para. 12; 57a). On April 10, 1976, charterer's counsel wrote to the panel, refusing to proceed with the arbitration, allegedly on the grounds that Prof. Sweeney was not a "commercial man" within the meaning of the arbitration agreement, and that the arbitrator appointed by the shipowner may be biased. (App. 58a). No copy of this letter was sent to shipowner's counsel,

who only learned of it when the chairman of the panel returned from abroad on or about May 11, 1976. (App. 7a-8a). Shipowner immediately applied for another order compelling arbitration and for sanctions for charterer's willful refusal to obey the first order and unreasonable multiplication of the proceedings. (App. 2a-3a; 59a). The order was granted only to the extent of compelling the arbitration, from which order and opinion the charterer presently appeals. (App. 86a-89a).

POINT I

THE DISTRICT COURT CORRECTLY HELD THAT IT LACKS JURISDICTION TO ADJUDICATE THE ALLEGED INCOMPETENCE OR BIAS OF THE ARBITRATORS BEFORE AN AWARD IS RENDERED.

The right of specific performance of an arbitration agreement is a statutory right and the Court's powers are statutorily prescribed. Saxis S.S. Co. v. Multifacs International Traders Inc., 375 F.2d 577 (2nd Cir. 1967).

It has often been held that the Courts have not been empowered by Congress to deal with alleged incompetence or bias of the arbitrators, except as provided in 9 U.S.C. §10, in a proceeding to vacate an Award. Merritt-Chapman-Scott Corp. v. Pennsylvania Turnpike Commission, 261 F.Supp. 1, 8 (M.D.Pa. 1966), aff'd 387 F.2d 768 (3rd Cir. 1967); San Carlo Opera Co. v. Conley, 72 F.Supp. 825, 833 (S.D.N.Y. 1946), aff'd 163 F.2d 310 (2nd Cir. 1947); Albetross S.S. Co. v. Manning Bros., 95 F.Supp. 459 (S.D.N.Y. 1951); Dover S.S. Co. v. Rotterdamsche Kolen Centrale, 143 F.Supp. 738 (S.D.N.Y. 1956).

In Dover S.S. Co., supra, it was expressly held that a motion to disqualify an arbitrator was not only improper, but thwarted the very purpose of expediting the disposition of commercial disputes. How much more serious is the obstruction where the charterer did not even take the trouble to seek relief from the Court, but merely refused to arbitrate, without advising shipowner, and by such a delay nearly deprived shipowner of the opportunity to produce a seagoing witness!

The principle was most recently reiterated in this judicial circuit in Sanko S.S. Co. v. Cook Industries Inc., 495 F.2d 1260, 1264 (2nd Cir. 1973), in which the Court of Appeals discussed the reasons for arbitrators' disclosures:

> "Moreover, the role of the judiciary in determining an arbitrator's impartiality after an award has been made will be significantly reduced, since the parties will have the opportunity at the outset of the arbitration to reject an arbitrator or accept him with full knowledge of his connections with the other party.
>
> * * *
>
> In certain disputes this will not be possible since the particular rules governing the arbitration may leave the determination of the question of disqualification to the arbitration panel. In such cases, a refusal by the panel to compel an allegedly partial arbitrator to step down will generally be reviewable by a district court only after an award has been made. Catz Am. Co. v. Pearl Grange Fruit Exch., 292 F.Supp. 549,551 (S.D.N.Y. 1968); Petition of Dover S.S. Co., 143 F.Supp. 738,742 (S.D.N.Y.1956); San Carlo Opera Co. v. Conley, 72 F.Supp. 825,833 (S.D.N.Y. 1946), aff'd, 163 F.2d 310 (2d Cir.1947). But see Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972)." (Underscoring added)

The dictum from San Carlo Opera Co., quoted at page 6 of charterer's brief, concerned only the Court's power to change its own appointee, and only if a question of the arbitrator's qualification were raised before the arbitration commenced. Whether or not the dictum that the Court had such a power is correct, the principle does not apply in the case at hand, in which the charterer waited for more than two years after Prof. Sweeney's appointment to raise an objection. It was known from the outset that the professor was a teacher and a lawyer.

If the Court were deemed to have the power to vacate the appointment of an arbitrator before an award is rendered, nevertheless it also has the authority at its discretion to refuse to exercise that power. In the case at hand, the Court properly refused to adjudicate the underlying issue. On the contrary, the Court exerted efforts to expedite a decision for the very reason that shipowner's ability to produce the testimony of a seagoing witness was severely restricted. (App. 66a). Indeed, shipowner's petition came on to be heard so near to the last date on which the witness was available only as a result of Charterer's failure to notify shipowner of the refusal to arbitrate. After the petition was granted and an arbitration hearing was scheduled, both the District Court and the Court of Appeals properly denied charterer's ex parte applications to stay the arbitration hearing.

There is no encroachment upon charterer's right to due process. Protection against a biased panel is assured by

the statutory right to seek vacatur of an award. Due process of law does not include the right to impose upon the shipowner the burden of a trial or other judicial procedures prior to arbitration, which the Federal Arbitration Act was specifically designed to avoid.

POINT II

CHARTERER HAS WAIVED ANY OBJECTIONS TO THE PANEL.

In the case of Prof. Sweeney, whom charterer alleges is not a "commercial man", charterer waited for two years after his appointment to raise the objection.

Concerning both Prof. Sweeney and Mr. Nelson, who is alleged to be partial, the charterer waived any objections when it expressly accepted the panel for the purpose of deciding the merits in the context of charterer's motion for summary judgment. Charterer's attitude that it would accept nothing less than a dismissal of the arbitration as proof of the panel's competence is untenable. Charterer should not be permitted to "test" the arbitrators by eliciting a ruling on the law, and, finding the legal prospects unfavorable, thereafter raising spurious objections to delay or avoid the arbitration with these men.

By submitting to the panel the merits of the case, without an objection to the panel's competence, charterer waived such objections. See Cook Industries v. Itoh & Co. (America) Inc., 449 F.2d 106 (2nd Cir. 1971); Island Territory of Curacao v. Solitron Devices Inc., 356 F.Supp. 1, 12

(S.D.N.Y. 1973), aff'd 489 F.2d 1313 (2nd Cir. 1973); Ilios Shipping & Trading Co. S.A. v. American Anthracite & Bituminous Coal Corp., 148 F.Supp. 698 (S.D.N.Y. 1957), aff'd 245 F.2d 873 (2nd Cir. 1957); Petrol Corp. v. Groupe-Ment D'Ashat Des Carburants, 84 F.Supp. 446 (S.D.N.Y. 1949).

Further, charterer should not be permitted to withhold its objections to the arbitrators until the moment that shipowner requested a hearing to produce a seagoing witness, without so much as advising shipowner of the objections.

POINT III

THE PANEL IS QUALIFIED AND UNBIASED.

Charterer's complaint against Prof. Sweeney is that he is not a "commercial man". However, the Professor is an instructor of admiralty law, international business transactions and other commercial law courses. (App. 23a; 82a). He is profoundly qualified as a "commercial man".

The complaint against Mr. Nelson is that he is employed by a shipping agency which represents vessels whose insurance underwriters employ shipowner's counsel on matters arising in New York. Traditionally, "bias" is found where there is a financial interest in the outcome, or an extensive business relationship between an arbitrator and a party. Reed & Martin Inc. v. Westinghouse Electric Corp., 439 F.2d 1268, 1275 (2nd Cir. 1971). No such interest or relationship exists or is alleged to exist here.

Complete isolation on the part of an arbitrator in an esoteric industry is neither possible nor desirable. As

stated in Justice White's concurring opinion in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150, 89 S.Ct. 337, 21 L.Ed. 2d 301, 305 (1968):

> "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. Cf. United Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574, 4 L Ed 2d 1409, 80 S Ct 1347 (1960). This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators."

Charterer alleges nothing more against Mr. Nelson than that he is employed by a firm which is an agent for vessels whose owners' underwriters employ shipowner's counsel. To warrant a disqualification of Mr. Nelson, the Court must find a legal presumption of partiality inherent in such a relationship. No such presumption exists. See Texas Eastern Transmission Corp. v. R. L. Barnard, 177 F.Supp. 123 (D.Ky. 1959), reversed on other grounds, 285 F.2d 536 (6th Cir. 1960), where the counsel for a party to the arbitration was also the counsel for a bank of which one of the arbitrators was an officer.

The instant case differs vastly from Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2nd Cir. 1972) and Sanko S.S. Co. v. Cook Industries Inc., supra, relied upon by charterer. In Erving, the arbitration clause provided that disputes would be arbitrated by the Commissioner of the American Basketball Association. It developed that the Commissioner was a member of the law firm representing the Virginia Squires, and that the A.B.A. was accused of participating in the fraud against Erving.

Sanko S.S. Co. v. Cook Industries Inc. involved a failure to disclose extensive business dealings between the third "neutral" arbitrator's employer's parent company and the party which prevailed in the arbitration, as well as a failure to disclose a long-time relationship with the individual attorney who represented that arbitrator and his employer and the prevailing party. The case was remanded for a trial to determine the full extent of the undisclosed relationships, but there was no holding of a presumption of partiality.

CONCLUSION

THE DECISION AND ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

HEALY & BAILLIE
Attorneys for Appellee

Jack A. Greenbaum,

Of Counsel.